No. 56.

Brief of Mackey for P. C.

Filed Oct. 4, 1897.

IN THE

Supreme Court of the United States.

RICHARD H. FLETCHER,
Plaintiff in Error,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY,
Defendant in Error.

No. 56.

Writ of Error to the Court of Appeals of the District of Columbia.

Brief for Plaintiff in Error.

FRANKLIN H. MACKEY,
Attorney for Plaintiff in Error.

PRESS OF W. F. ROBERTS, WASHINGTON, D. C.

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BRIEF FOR PLAINTIFF IN ERROR.

I.

This was an action to recover damages for injuries received by the plaintiff in error "by and through the carelessness and negligence of the defendant, its servants and agents."

After the close of the plaintiff's case in chief, the court at the request of the defendant instructed the jury to find a verdict for the defendant.

Assignment of Error.

The court below erred in instructing the jury, at the close of the plaintiff's case in chief, to find a verdict for the defendant.

Statement of Case.

The record shows that on the 16th of May, 1890, the plaintiff was working at the workshops of the defendant. He had finished his work for the day at about a quarter of six in the evening and had started for home. When he reached the intersection of South Capitol street and Virginia avenue "he stopped to see if he could see any of the workmen coming, in order to have company on his way home; he was standing on the pavement on the south side of the railroad track." While standing there one of the defendant's repair trains passed on its return from work for the day. It was moving more or less rapidly according to the testimony of the various witnesses. One of the workmen aboard the train threw from the car in which he was standing, and just as it was passing plaintiff, a stick of bridge timber six inches square and about six feet long. It struck the ground and, rebounding, the end of it struck plaintiff in the region of the groin, and seriously injured him, so much so that he has never been the able-bodied man that he was before the accident. The morning after the plaintiff was injured orders were issued by the Company that the men should throw off no more wood while the train was in motion.

The evidence (R. 6,) shows that "one of the workmen [on the train] by the name of George Washington threw it [the stick of bridge timber] off."

There was no evidence as to the purpose for which Washington threw off this stick of bridge timber; whether it was to subserve his own purpose or that of his employer does not directly appear. The plaintiff, however, contends that under the rule *res ipsa loquitur* he has shown *prima facie* the negligence of the defendant when he shows that the timber was thrown by one of the defendant's workmen from the defendant's moving train, and the resulting injury. If it be a defence that the workman in this instance was not acting in behalf of the defendant, *i. e.*, was acting beyond the scope of

his special employment, that is a fact which should appear from the evidence. *Prima facie* when a train hand throws from the train a piece of bridge timber which is being carried upon the train he is acting in behalf of his employer and when a resulting injury occurs to a by-passer *res ipsa loquitur*, negligence is presumed.

See Am. Ency. Law, Vol. 16, p. 449 (1st ed.), note 1.
Cooley on Torts, 1227–1235.
Shear and Red Negl. §59.
64 Am. Decisions, 502 note.

II.

But even if the workman, Washington, is to be presumed to have thrown off this piece of timber for his own benefit, yet the evidence as to the long continuance of such a custom or practice among the workmen was sufficient to allow the jury to presume that the defendant knew of the practice and permitted it to be done. The evidence upon this point was that the defendant corporation was in the daily habit, for eight or ten years or more, of running every morning out of Washington and Alexandria, a "repair train" of open flat cars loaded with its employés; that this train returned every evening about six o'clock bringing the workmen back to their homes; that these men were allowed the privilege of bringing back with them, for their individual use as firewood, sticks of refuse timber left over from their work after repairing the road, such as old pieces of bridge timber, old cross ties, etc., that it was the constant and daily habit of the men during all these years to throw off these pieces of firewood while the train was in motion at such points on the road as was nearest their homes where it was picked up and carried off by some member of their families, or other persons waiting there for it. The only caution given the men was "that they should be careful not to hurt anyone in throwing it off." This instruction was given by the foreman of the workmen.

The plaintiff's contention is that this practice of throwing wood from the moving trains had continued for so long a time (eight or ten years), was so frequent, so open, and so notorious, that knowledge of the practice might well have been imputed by the jury to the defendant, and it was error not to permit them to consider the question. For if the defendant knew or should have known of its existence, and that its train was being constantly used as a necessary means of carrying on a dangerous practice to by-passers; knew that this was being done by men in its employ, and knew that it had the power to prohibit it, yet nevertheless did not prohibit it, then it is liable to respond in damages to the plaintiff.

"The law requires of persons having in their custody instruments of danger [and a rapidly moving railroad train is an instrument of danger] that they should keep them with the utmost care. 1 Hill, Torts (3rd ed.) 127. Sometimes, says Pollock, the term 'consummate care' is used to describe the amount of caution required; but he says it is doubtful whether even this be strong enough. At least we do not know any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him. Pol. Torts 407; see also Whart. Neg. 851. And it stands to reason that one charged with a duty of this kind cannot devolve it upon another, so as to exonerate himself from the consequences of injury being caused to others by the negligent manner in which the duty in regard to the custody of such an instrument may be performed. Speaking of the absolute duty imposed by statute in certain cases, as also the duties required by common law of *common carriers*, of owners of dangerous animals, or other things involving, by their nature or position, special risk of harm to neighbors, Pollock observes: The question is not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant, or of an 'independent contractor,' but whether the duty has been adequately performed or not. Pol. Torts 64."

Walker *vs.* Hannibal & St. R. R. Co., 26 S. W. Rep. 363.

In the case at bar we have a moving train of cars passing through the streets of a populous city. The master—a Rail-

road Company—knew, or should have known, that its employés were using this train as a means of carrying home their firewood and that they were constantly throwing this wood from the moving cars to the great danger of pedestrians. Instead of forbidding this to be done, it rather encouraged it, the only caution imposed being "that they should be careful not to hurt anyone." This practice of its employés was kept up for years and was a thing of daily occurrence, no effort was made to stop it, and no rule made in regard to it. Can it be said under such circumstances that the defendant exercised proper caution in the use of its property?

The declaration charges that the plaintiff was injured "by and through the carelessness and negligence of the defendant, its servants and agents." It is submitted that the facts in evidence abundantly tend to prove the charge and that the court erred in not permitting the evidence to be considered by the jury.

There are two maxims of the law which are plainly applicable to this case, namely:

> Sic utere tuo ut alienum non laedas.
> Qui non prohibet, cum prohibere possit, jubet.

When a railroad company undertakes the business of running its trains through and along the busy streets of a crowded city the duty is at once imposed upon it of exercising such a degree of care in the management of its trains as will eliminate as far as it is reasonably possible every known element of danger to pedestrians, and if instead of doing this it knowningly permits its employés who are aboard these moving trains to use them in a manner dangerous to persons passing upon the streets, as for instance to permit them to habitually carry sticks of firewood upon the train and to throw them from the cars while in motion, though it be for their (the employés) exclusive benefit, the company will be liable if any person is injured thereby, for whenever and wherever a person is charge-

able with proper care in the use of his property, he is, under the maxim *sic utere, etc.*, liable if he knowingly permits his employés to use it in a manner dangerous to the public where injury results from such use. What the particular piece of property is which is thus used, or the manner in which it is used is of no consequence if the use to which it is put is a dangerous one. It may be dynamite, or it may be a moving train of cars, or it may be a thing harmless when used for one purpose and dangerous when used for another, such as we might conceive a train of flat cars—harmless when used for legitimate purposes, but dangerous when used for carrying home workmen with sticks of firewood which they are in the habit of throwing from the moving cars into the public streets. In such cases it is the master's business to take proper precaution that his employés do not use his property in a dangerous manner, or as it is frequently said "When the master sets a dangerous agency in motion he must control it." And more especially is this care and diligence imposed upon a corporation when running its trains through a populous city.

"Railroads operating their franchises in populous cities, and over and along public thoroughfares, where the hazard to persons and property is great, will be held to a high degree of caution and skill, commensurate with the extra hazard."

Toledo Wab. & West. R. R. *vs.* Harmon 47 Ill., p. 298.

In Wood on Master and Servant, Sec. 321, it is laid down as a rule of law that in that class of cases where the master owes certain duties either to third persons or the *public*, whether the same arises from contract or statutory obligations he becomes absolutely responsible for the *manner* in which the duty is performed, precisely as though he himself had performed it, and this without any reference to the question whether the servant was *authorized* to do the particular act. Wood M. & S. Sec. 321.

In accordance with this rule it was held by this Court in Railroad *vs.* Derby, 14 How. 468, that where the servant of a railroad company took an engine and ran it over the road for his own gratification, not only without consent, but contrary to express orders, the railroad company was responsible. So in Railway *vs.* Hinds, 53 Penn St. 512, a passenger's arm was broken in a fight between some drunken persons that forced their way into the car at a station near an agricultural fair, and the company was held liable, because the conductor went on collecting fares, and did not stop the train and expel the rioters, or demonstrate by an earnest effort that it was impossible to do so.

In the case at bar we have seen that the defendant Railroad Company owed a duty to the public which duty was to run its train through the city with the least possible danger to pedestrians. Now can it be said that it is performing its duty to the public when it permits its employés habitually to throw logs of wood from its moving cars into the public streets to the injury of persons who may happen to be passing? Surely not, the doctrine *qui non prohibet, cum prohibere possit, jubet* applies in such a case with all its force. Who is responsible in such a case? Judge Cooley answers the question; he says:

"Passing now to the class of unintended wrongs, we find them to consist most commonly in the *neglect* to perform some *duty*, which the party has assumed by contract, *or which the law has imposed* because of official position or some special relation. In such cases * * * the person who in legal contemplation is the wrong doer is the person who was burdened with the duty, and who has failed in its performance." Cooley, Torts 162.

Scope of Employment Not the Question.

It was held by the court below that because these pieces of wood were being carried by the workmen for their personal uses and not for any purpose of the defendant they could not be said

to be doing anything within the scope of their employment, and on the principle that the master is not liable for any act of the servant done for his (the servant's) benefit and not within the scope of his employment the defendant could not be held to respond in damages to the plaintiff. The court thus lost sight of the important element of this proposition, *i. e.*, whether this practice was carried on with the permission and *authority* of the defendant. This feature of the case was lost sight of by the court, and not only this but still another important matter was ignored—namely, that there is a great difference between an *isolated* act done by an employé who had given his master no reason to suppose that the act would be done, and an act done in pursuance of a long established practice or custom which the master knew of and had never prohibited.

In Snow *vs.* Fitchburg R. R. Co., 136 Mass. 552, the plaintiff who was standing on the platform of the station was struck by a mail-bag "thrown," says the report of case, "*in accordance with a custom known to the corporation* by a mail-agent in the employ of the United States, from a mail car belonging to the corporation on one of its express trains running at a high rate of speed." It was held that the plaintiff could recover. Said the court.

"The defendant voluntarily furnished a car to run on its express train, from which it *knew* that mail-bags were to be thrown at the station where the plaintiff was when the train was under full speed. Obviously unless good judgment and great care were used by the mail-agent in throwing out the bags * * * danger was likely to result to passengers on the platform of the station.

"*There was evidence in the case tending to show that mail-bags had not unfrequently been thrown from this car, in such a way as to strike upon the platform where the plaintiff stood* and if this evidence was *believed*, the court [jury] was justified in *inferring that the defendant knew*, or in the exercise of proper care, ought to have known this. *It was within the power of the defendant to prevent this practice of throwing out mail-bags*, if in no other way by withholding the use of the car, or by stopping the train at the station."

This case, it is submitted, is "on all fours" with the case at bar. The record here shows that there was evidence before the jury that these billets of wood had been habitually and for a long period of time, thrown by the defendant's employés from this repair train while in motion, and the jury might well have inferred, had they been allowed to consider the evidence, "that the defendant knew, or in the exercise of proper care, ought to have known, it." So too, to use the very language of the Massachusetts case, "It was within the power of the defendant to prevent this practice." But so far from issuing an order prohibiting it, there were facts, as we have seen, from which the jury would have been justified in inferring that the defendant permitted it to be done.

The case of Walton *vs.* New York Central Sleeping Car Co., 139 Mass. 556, was strongly relied upon by the defendant in the court below. But nothing can be clearer than the difference between the facts of that case and the case at bar. In that case Maxwell, the porter of a parlor car belonging to the defendant, had arranged with a young woman to throw from the car as it passed near her mother's house a bundle of soiled clothing. The report of the case says "*he had never thrown a bundle before*," meaning, of course, from the car while in motion.

This bundle hit the plaintiff who was standing on the adjoining track as the car rapidly passed. Maxwell testified that he threw off the bundle for his own convenience, and that nobody instructed him to do so. The court held that the defendant was not responsible "*if* the injury to the plaintiff was done by Maxwell * * * *without the authority of the defendant*, and not for the purpose of executing the defendant's orders, or doing the defendant's work, and not while acting as such servant in the scope of his employment."

The case, therefore, was radically different from the case at bar. Two of the most important facts, the very *turning points* of the case at bar, were absent from this Parlor Car case. In

that case it was an *isolated* act, it was shown that the employé had never before thrown objects from the car while in motion. In the case at bar there was evidence going to show it to have been the long and constant practice of the employés. In the Parlor Car case the employé acted *without the authority of the defendant.* In the case at bar there was evidence (viz., the frequency and long continuance of the practice) from which the jury could have inferred that it was done with the *implied* if not express authority of the defendant. Suppose it had been shown that for years it had been the constant practice of the employés of the Sleeping Car Company to throw their bundles of soiled linen from the cars while in motion and that no rule of the Company had ever issued to prohibit it? Would not the ruling of the court have been quite different? *A fortiori* it would have been so if instead of bundles of soiled clothing it had been their habit to throw off their firewood in the shape of pieces of bridge timber, old cross ties and the like.

Another feature of the case at bar completely ignored by the court below was that which we have already endeavored to establish, viz., that where the master undertakes to operate with dangerous agencies, he must control these agencies and cannot escape liability when it is shown that he was negligent in the *care* of the agency with which he has chosen to operate. Thus in Walker *vs.* Hannibal & St. Joe R. R., 26 S. W. Rep. 363, certain of the defendant's employés took a number of torpedoes kept by the defendant for use in the conduct of its business, and for their own amusement exploded them, for the purpose of playing a joke upon some lady passengers aboard the train. The torpedoes were laid upon the rails at the station and, as the cars moved out, exploded to the great alarm of the ladies and amusement of the employés. It appears that one of the torpedoes fell from the rail and consequently was not exploded. It was afterwards picked up by some boys, one of whom was almost immediately injured in the endeavor to find out what it was. Suit was brought and the company was

charged with negligence in leaving so dangerous an article as a torpedo upon the railroad track. The defense was that it was left there not by the company in the prosecution of its business, but by certain of its employés for their own amusement, and not in the proper course of their employment, and the doctrine was invoked that the master is only liable for the servant's negligence when the act done is in the scope of his employment, but the court held that torpedoes were dangerous instruments and that it was the duty of the defendant company to keep them with the utmost care, and if it committed them to the care of servants who used them carelessly even though for their own benefit or amusement, it was liable for resulting injuries to third persons. In the course of the opinion the court used the language which will be found on page 4 of this brief.

But leaving out of the case one of the most important elements in it, namely, the degree of care imposed upon a person operating with dangerous agencies, and treating it as a case purely of master and servant, we find it quite a different case from that which the court below seems to have regarded it, for this is not a case where a servant employed by the master for a particular service, undertakes without the knowledge or consent of the master to do something beyond the sphere of his employment, and from which an injury results to a third person. It is quite a different case. It is the case where a *number* of servants, repeatedly and continuously through a long course of years, use with the master's knowledge and implied consent, the master's property for a hazardous purpose.

If the practice of the company's employés in respect of throwing wood from its moving trains, had not been *long continued*, if it had been rarely done, and was exceptional rather than habitual and when brought to the knowledge of the company had been prohibited, or if it had been an isolated and single act which the company had no just reason to expect would have been done, quite a different case would have been presented.

To formulate the law of this case into a compact legal proposition, it may be stated as follows:

1. Where a number of servants, *with the master's knowledge and implied consent*, habitually use the master's property in a manner likely to result in injury to persons lawfully on the public thoroughfare, and it is in the master's power to prohibit his servants from so using his property, and he does not do so, he is liable if injury results to any such persons from such practice, even though the practice itself was entirely out of the sphere of the servant's employment.

2. Whether the master had knowledge of the practice and consented thereto, *are questions for the jury* from all the circumstances of the case, and among such circumstances would be the frequency of the practice, the number of men engaged in it, its long continuance, its notoriety and the like.

3. These principles apply with greater force when the master is a railroad corporation operating a railroad in a populous city, and it moving trains are used with its knowledge, by its employés for dangerous purposes of their own.

It is submitted, therefore, that the court erred when it took these questions from the jury.

III.

The Fellow-Servant Doctrine.

It remains only to refer briefly to one point raised by the defendant in the court below, and which, although it was rejected as a proposition of law by the learned judge, may be brought forward again in this court. It was argued that the plaintiff was an employé of the defendant, and that as the men who threw the sticks of wood were also employés of the same master, they must be deemed fellow servants. But this proposition cannot be maintained under the facts. The plaintiff had finished his day's work and was on his way home and it is well settled that a workman is not a fellow servant to other

workmen when he has finished his work and left his place of employment and is on his way home. See Balt. & O. R. R. *vs.* Trainer, 33 Md. 542, 554; Baird *vs.* Pettit, 70 Pa. St. 477, 483; Hurst *vs.* C. R. I. & P. R. R., 49 Iowa 76.

A point also sought to be made by the defendant in the court below was that because Washington's "days work had been done and he was on his way home, as was the plaintiff," he was not at that time in the employ of the defendant, and therefore the relation of master and servant did not exist. But this cannot be maintained under the authorities. Fletcher's case was quite different from Washington's; Fletcher had left *his place of employment* and was on his way home, and, as we have shown by the authorities cited on p. 12 of plaintiff's brief, this put an end for the time being to the relation of master and servant, between the defendant and Fletcher. But the relation still continued as to Washington. The authorities all hold that railroad hands *who are carried on the company's trains to and from their work* are in the employment of the company until they *leave the train*, although they have finished their work for the day and are on the train only for the purpose of being brought back to their homes.

Vick *vs.* New York, etc., R. R., 95 N. Y., 267.
Russell *vs.* Hudson River R. R., 17 N. Y., 134.
Gillshannon *vs.* Stonybrook R. Co., 10 Cush, 228.
Bryan *vs.* Cumberland V. R. Co., 23 Pa. St., 384.
Prather *vs.* Richmond & D. R. R., 80 Ga., 427.
Kumler *vs.* Junction R. R , 33 Ohio St., 150.

And the same is the rule in England.

Tanney *vs.* Midland Ry. Co. L. R., 1 C. P., 291.

IV.

The Opinion of the Court of Appeals.

The court below proceeding upon the assumption that the throwing of the wood from the moving train was, as contended

by the plaintiff, a continued practice, says: p. 391, Appeal Cases D C., Vol. 6.

"Assuming knowledge on the part of the defendant [of this practice], the only act of which negligence could be predicated was in allowing the men to drop or throw off from the moving train along the street, the wood brought in by them, to be taken to their homes for fuel. This *as the evidence* shows had been a practice indulged in for several years, and there had never been an accident resulting thereform before, and there had been no complaint of the habit either by the police of the city or by others. Under the circumstances we do not think the mere allowing the wood to be thrown from the moving train was culpable negligence on the part of the defendant *per se*, though of course the manner of throwing off the wood in a particular instance might constitute negligence."

The criticism to be made of this view of the question is:

1. That whether the throwing off of the wood was negligence or not depended upon all the circumstances of the case, and these circumstances was a *question for the jury* and not for the court.

2. That it is difficult to see how the fact that nobody had ever before been injured and hence nobody had ever before complained (if these be facts for there was no evidence one way or the other about them) can exculpate the defendant when at last an injury does result.

3. Nor can we see how it can be held not negligence *per se*, for the defendant to allow its workmen to throw from its rapidly moving trains (one witness said twenty miles an hour) pieces of bridge timber, old cross ties, etc., in the streets of a populous city. The very fact that the foreman told the men that in throwing off the wood they must be careful not to hurt any one is evidence that the practice was considered so dangerous as likely to hurt the by-passers unless care was taken.

Another criticism to be made of the opinion of the court is based upon the following language to be found therein, p. 392.

"The person who threw off the piece of wood that injured the plaintiff was not in the performance of any duty required of him by the defendant, but his act was wholly independent of any duty imposed upon him by his employment to work for the defendant. In other words the act was not within any limit or scope of authority derived from the defendant, as agent or servant in the performance of duty."

It is conceded there was no evidence as to the purpose of the workman, Washington, in throwing off this piece of bridge timber from the moving train. How then can the court assume that he, a workman in the employ of the defendant, was not acting in the scope of his employment? We submit the assumption is directly the other way. Given a moving train manned by the defendant's employés it must be presumed, until the contrary is shown, that when the workmen are found throwing off bridge timber from the train they are acting in behalf of the defendant and under its authority. But the question back of all this is that it was for the *jury* and not for the court to pass upon the evidence and say whether the workman was acting within the scope of his employment, and also whether the use of the train for such a purpose was dangerous, and if so whether it was sanctioned by the defendant. If these facts had been found against the defendant it is surely law that it cannot escape liability to one who suffers from its knowingly permitting its workmen to use its trains for purpose found by the jury to be dangerous.

It is further submitted that the distinction made by the court below between the mail car case (136 Mass., 552), and the case at bar, viz: that in the mail car case the person injured was a passenger and in the case at bar a by-passer is not tenable. There can be no doubt that it would have made no difference in the finding of the Massachusetts Court if the injured party had been a by-passer instead of a passenger.

"It is not proper for the Court to instruct the jury 'that upon the whole evidence the plaintiff ought not to recover'

if *any possible construction of the testimony* would support the the verdict."

Bank of Washington *vs.* Triplett, 1 Peters 25.

FRANKLIN H. MACKEY,

Attorney for Plaintiff in Error.

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Brief of Mackey for P.E. (reply)

Filed Oct. 18, 1897.

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THE BALTIMORE AND POTOMAC RAILROAD COMPANY.

Brief for Plaintiff in Error in Reply to Brief for Defendant in Error.

FRANKLIN H. MACKEY,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-16-'9

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The case at bar, involving, as it does, a question of considerable interest in point of law, aside from its importance to the plaintiff in error, will, it is believed, excuse us if we undertake to examine some of the positions taken by defendant in error in his brief, and which we have had no opportunity to discuss in the light of that brief.

In the first place, in criticising Snow *vs.* Fitchburgh R. R. Co., 136 Mass., 555, defendant's counsel argues (p. 8) as a justification for the decision in that case that—

"It is evident that in furnishing a mail car on this express train the Fitchburg railroad *must have known* that it would be used for the very purpose of delivering mail bags, and from the statement of the case it seems that it had *actual notice* that mail bags would be delivered at this station, and

as it *knew* in making its time-tables that its own train did not stop there, it *knew* that the mail bag must be flung off at full speed."

This is precisely the argument we have used in the case at bar. We say that from the evidence of the frequency of the acts of the workmen in throwing wood from the rapidly moving train, taken with the fact that the foreman had cautioned the men to throw it carefully "so as not to injure any one," and the long continuance of the practice through several years, the jury would have been justified in finding that the defendant "must have *known* that it (the train) would be used for the very purpose" of throwing—not mail bags, but huge pieces of timber. Defendant's counsel, we presume, will admit that the likelihood of injury if one is struck by a piece of bridge timber is much greater than if he were struck by a leather mail bag.

Again, defendant's counsel says (p. 10):

"Why should we not assume that this piece of bridge timber was properly and lawfully on the car and that George Washington threw it at the plaintiff wantonly or for the purpose of injuring him or scaring him."

We reply that it is perfectly proper to assume that "this piece of bridge timber was properly and lawfully on the car." Indeed, it would be improper to *assume* that the defendant had it there improperly and unlawfully; being there, then, properly and lawfully, one of the defendant's workmen threw it from the car while the train was moving rapidly, and just as we are compelled to assume that the bridge timber was properly on the car, so, on the same principle, we are compelled to assume that this workman, being in the employ of the defendant at the time he threw it from the train, threw it in the discharge of the duties of his employment. If it was not within the scope of his employment that was matter of defense to be shown by the defendant. We show the defendant's workman throwing a piece of

bridge timber from a train where it properly was. Why shall we assume he threw it off wantonly, and why shall we not assume, upon the principle that all things are presumed to be done rightly until the contrary appears, that this workman had the authority of his master to throw this piece of timber from the car? And is not all this a question for the jury rather than for the court? If he had such authority and did it negligently the master is liable, of course.

But defendant's counsel says: "There was no possible color of discharging his duty on the part of the man who threw off the bridge timber. *His day's work was over*, and the timber was *no part of the load which had been on the train.*" We have in our principal brief (p. 13) shown by the authorities that a railroad hand when carried on a train to do work along the road does not when he is being brought back to the depot or station at the close of the day cease to be in the master's employ until he reaches the depot and leaves the train. So that this train hand's "day's work" *was not over* until he reached the depot at Washington. We also submit that defendant's counsel, having just asked us to assume that the bridge timber was properly on the train, can hardly be heard to argue that the bridge timber "was no part of the load which had been (*sic*) on the train."

The authorities cited at top of page 11 to the point that a master is not liable for the act of a servant done by the latter to gratify his, the servant's, private hate, &c., doubtless support that proposition; but it is difficult to see what application they can have to the present case, since there is not a scintilla of evidence that this workman threw this piece of bridge timber at the plaintiff to gratify his, the workman's, private hate. If the defendant contends it was done for that purpose he should have given some evidence tending to show it.

The defendant says: "Suppose a laborer riding home on a train of cars loaded with coal, passing through the city, should, mischievously or otherwise, throw a chunk of coal

at a person on the street and injure him, would the railroad company be liable for the injury?"

Certainly not, if he purposely threw it *at* him. There is no evidence that Washington *purposely* threw this bridge timber *at* Fletcher; but let us suppose it had been the custom for years for the workmen to throw off large pieces (a foot or more square) of this coal as the rapidly moving train passed their houses; and that this coal was thrown off by them for fuel; and that the custom was *well known* to the railroad officials; and that they permitted it to be done with no other caution than that they, the workmen, should "be careful not to hurt any one." Then, suppose on one of these days one of these workmen is seen to throw off in the customary manner a large chunk of coal which, rebounding, struck a passerby. Will it be said that the burden was not then on the company to show (if such were its defense) that the workman did this wantonly for the purpose of injuring the by-passer? And if this were not shown would not the jury have a right, from all the evidence of the custom, to conclude that the workman was *permitted* by the company thus to use the company's property, to the great danger of the public, with no other caution than that "he should be careful?"

O'Neill *vs.* Keokuk, etc., R. R. Co., 45 Iowa, 546 (cited by defendant's counsel, p. 12 of his brief), so far from supporting him, is directly in favor of plaintiff's contention, for while it is there said that "a violation of a rule of the company is not admissible to establish a waiver of the rule," this correct proposition is immediately qualified by the words "*unless* it be shown that the custom was *known* to the officer charged with the enforcement of the rule." Now, in the case at bar the evidence is that the foreman not only *knew* of this practice of throwing off heavy pieces of timber, but actually *sanctioned* it by telling the men "to be careful not to hurt any one" while they were doing it.

The illustration of the lighted pipe and the match (p. 12)

is not all in point. Throwing a match weighing the one one-hundredth of an ounce from a moving car bears no comparison to throwing a piece of bridge timber weighing possibly fifty or a hundred pounds.

THE PROOF CONFORMED TO THE DECLARATION.

The citation from Chitty (p. 15 of defendant's brief) is a complete answer to the contention that plaintiff should have alleged the custom in his declaration. "The negligence of the servant," says Chitty, "may be stated as that of the master." In our declaration we charge that the injury was committed "by and through the negligence of *the defendant*," &c. This permits us to prove that the master was guilty of negligence in *knowingly permitting* his servant to use the master's railroad train (a dangerous instrument) and the master's bridge timber in a negligent manner dangerous to the safety of the public and while the servant was in the employ of the master.

Again (p. 15), defendant's counsel says: "The proof showed that the alleged servant of the defendant was not acting as its servant at the time of the injury." In reply we say that whether he was acting as the defendant's servant at the time of the injury was a question for the jury. We say the proof shows that he was acting *as such servant*. The defendant denies this. Who shall decide this mixed question of law and fact but the jury under the instructions of the court as to the law? But the court took unto itself the determination of both these questions, ignoring the province of the jury entirely, and it is of this that we complain.

Lastly, the fellow-servant doctrine, as announced by the learned counsel, is so fully replied to in our principal brief (p. 12) that we need only refer to that.

Respectfully submitted.

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Attorney for Plaintiff in Error.

No. 56.

Appt. to Br. of Mackey

Filed Oct. 26, 1897.

IN THE

Supreme Court of the United States.

RICHARD H. FLETCHER
vs.
THE BALTIMORE AND POTOMAC R. R. } No. 56.

Correction of Error in Citation in Appellant's Brief.

The case cited on pages 4 and 10 of appellant's brief as Walker *vs.* Hannibal & St. J. R. R., 26 S. W. Rep. 363, should be Railway *vs.* Shields, 47 Ohio State Rep. 387.

The case of Walker *vs.* Hannibal & St. J. R. R. is now reported in 121 Mo. 575 and is the case referred to on the argument as the "drill case," *i. e.*, where an iron drill was thrown from the car by the baggage man injuring a by-stander who brought suit to recover for said injuries.

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Attorney for Appellant.